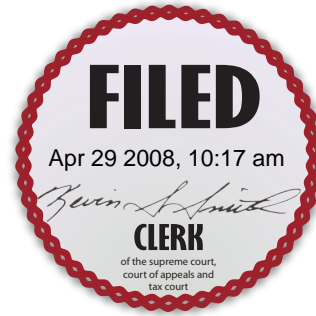


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

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**IN THE
COURT OF APPEALS OF INDIANA**

DEAN MAUST,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 50A03-0703-PC-143
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0310-MR-0001

APRIL 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Dean Maust appeals the trial court's summary denial of his petition for post-conviction relief. We affirm.

ISSUE

Maust raises one issue for our review, which we restate as: Whether the trial court erred in summarily denying Maust's petition for post-conviction relief without referring the matter to the State Public Defender, when Maust filed a "Petitioner's Pro Se Appearance Form for Post-Conviction Relief" and indicated on his petition for post-conviction relief that he was appearing pro-se, but requested counsel in a cover letter to the trial court clerk.

FACTS AND PROCEDURAL HISTORY

In 2004, Maust was convicted of murder and was sentenced to a prison term of sixty-five years. Maust appealed his conviction, questioning *inter alia* whether trial counsel was ineffective for failing to object to certain members of the trial audience wearing buttons with the victim's picture on them. We affirmed the conviction. *Maust v. State*, No. 50A03-0502-CR-80 (Ind. Ct. App. December 27, 2005).

On October 16, 2006, Maust filed a petition for post-conviction relief. The petition and an attached appearance form indicated that Maust was appearing pro se; however, a cover letter to the Clerk of Superior Court 1 requested that the clerk "advise the Court that I have requested the appointment of the Office of Indiana Public Defender to represent me and I have completed and attached the necessary affidavit of indigency. Should the Court declare me indigent, please forward a copy of the enclosed petition . . .

.” (Appellant’s App. at 17). The trial court’s Chronological Case Summary does not show that a request for determination of indigency related to representation was filed along with the petition for post-conviction relief and pro se appearance. On October 18, 2006, the trial court issued an order in which it found that (1) Maust filed a petition for post-conviction relief; (2) Maust “does not request a public defender and proceeds pro se;” and (3) the State had twenty days to answer. (Appellant’s App. at 28).

On October 24, 2006, the State filed a response to Maust’s petition for post-conviction relief asserting *inter alia* that (1) Maust waived the issue raised in his petition because it was available to him on direct appeal; (2) Maust failed to state a claim upon which relief may be granted; and (3) Maust’s petition was prohibited by res judicata.

Maust did not contest the trial court’s October 18, 2006 order. Indeed, on December 18, 2006, he filed an extensive “Motion for Discovery Order” in which he classified himself as proceeding pro se. On December 19, 2006, the trial court summarily denied Maust’s petition for post-conviction relief. It also denied Maust’s motion for discovery as moot.

Maust filed a pro se motion to correct error in which he raised a number of issues, but not the issue of representation. The trial court denied the motion, and this appeal ensued.

DISCUSSION AND DECISION

I. STATE’S MOTION TO STRIKE AFFIDAVITS

In making his argument that the post-conviction court erred by not allowing him to confer with counsel, Maust refers to two affidavits attached to his brief. The State

contends that we should strike these affidavits because they are not part of the record below. Because the affidavits were not made part of the record below, we grant the State's motion to strike. *See Head v. State*, 683 N.E.2d 1336, 1337 (Ind. Ct. App. 1997).

II. COUNSEL

Maust contends that the trial court erred in summarily denying his petition for post-conviction relief without allowing him to confer with counsel. He points to the contents of his cover letter as proof that he did not wish to proceed pro se.

The record shows that even though Maust's cover letter made a request for representation by the public defender upon the court's determination of his indigency, he filed a pro se appearance and a verified petition for post-conviction relief in which he indicated that he was proceeding pro se. When the trial court issued its order stating its belief that Maust was proceeding pro se, Maust did not contest that belief. Instead, Maust filed an extensive pro se petition for discovery. Later, upon denial of his petition, Maust filed a pro se motion to correct error in which he did not raise the question of representation. Under the circumstances of this case, we cannot conclude that the trial court erred in determining that Maust was proceeding pro se.

Furthermore, we note that Maust raised the very issue of ineffective assistance of counsel on direct appeal that he attempted to raise in his petition for post-conviction relief. The issue is not available in a post-conviction proceeding if it was raised on direct appeal. *See Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*, 528 U.S. 861, 120 S.Ct. 150, 145 L.Ed.2d 128 (1999).

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.